UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

ELIZABETH L. PERRIS
BANKRUPTCY JUDGE

1001 S.W. FIFTH AVENUE, # 700
PORTLAND, OREGON 97204
(503) 326 - 4173

DIANE K. BRIDGE, LAW CLERK
JULIET M. KAESTNER, LAW CLERK

NOT FOR PUBLICATION

August 31, 2005

Robert J. Vanden Bos
Vanden Bos & Chapman, LLP
319 S.W. Washington, Ste. 520
Portland, OR 97204

Wayne Godare
Office of the Trustee
1300 S.W. 5th Ave., Ste. 1700
Portland, OR 97201

Bradley O. Baker
15545 Village Park Ct.
Lake Oswego, OR 97034

Re: Dale R. Gordon, Case No. 04-38864-elp13
Objection to Confirmation

Dear Counsel:

At the close of the confirmation hearing in this case, I took the matter under advisement. The purpose of this letter is to give you my ruling on confirmation of debtor Dale Gordon's chapter 13[1] plan. As explained more fully below, I cannot confirm debtor's Second Amended Plan, because debtor has failed to demonstrate that the $63,000 he proposes to pay in lieu of having a fraudulent conveyance claim pursued against his former spouse satisfies the requirement of § 1325(a)(4) that creditors receive at least as much as they would receive in Chapter 7 (the best interests test).

FACTS

The following facts are either established by the evidence or were stipulated to by the parties. Creditor Columbia Cascade Company (Columbia) holds a state court judgment against debtor, entered August 6, 2004, for breach of fiduciary duty. Debtor filed a chapter 13 petition on August 18, 2004. The amount due on Columbia's judgment as of the petition date was $185,068.91.

---

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

Before the state court trial between Columbia and debtor commenced, debtor's former wife, Jani Shea Gordon, filed a petition for dissolution of marriage. Debtor consented to entry of judgment and waived the statutory waiting period, so that the dissolution judgment was signed the same day it was filed and was entered a day later, on July 1, 2004.

The stipulated dissolution judgment divided the marital property. As relevant here, Ms. Gordon received one of the parties' two houses (the Wintergreen property), one-half the equity in the second house (the 133rd Ave. property), her PERS account, and a $123,555 judgment against debtor. Debtor received one-half the equity in the 133rd Ave. property and his IRA, and he assumed the entire $185,000 Columbia judgment.[2]

Other than possible claims of taxing authorities, which debtor asserts are zero, Columbia and debtor's state court counsel are the only unsecured creditors listed in debtor's chapter 13 schedules.

Debtor proposes a chapter 13 plan that would require monthly payments to the trustee of $100 per month for three months and $428 per month thereafter, plus an amount necessary to meet the best interests test. The plan provides that the best interests number is $8,934.25, "plus value of alleged fraudulent conveyance claim against Jani Gordon as determined by the court at the Confirmation Hearing as provided in paragraph 14." Second Amended Chapter 13 Plan ¶ 2(f). Paragraph 14 provides that "[t]he Trustee's alleged avoidance claim against Jani Gordon shall be valued by the Court at the time of confirmation in a summary procedure and the valuation added to the amount to be paid by Debtor in paragraph 2(f)." Id. at ¶ 14. In his prehearing memorandum, debtor argued that the maximum amount that should be added to the best interests number to account for the potential avoidance action against Ms. Gordon was the settlement value of the claim, which he asserted was between $25,000 and $35,000. Debtor's Response to Columbia's Objection to Confirmation at 17. At the confirmation hearing, debtor increased the best interests value of the avoidance action to $63,000.

---

[2] The parties divided other property, but for purposes of this confirmation litigation, debtor and Columbia agree that the value of the other property awarded to each party was equal.

Columbia objects to confirmation of this plan,[3] arguing that (1) the plan was proposed in bad faith; (2) the plan does not provide for payment of all of debtor's disposable income; and (3) the plan does not meet the best interests test. In addition, it asks that the court allow it to pursue the avoidance action against Ms. Gordon under an assignment of the trustee's avoidance powers. I reject the request for assignment of the trustee's avoidance powers, and therefore will deny Columbia's motion, filed October 26, 2004, for assignment of the claim.

1. Bad faith

Columbia asserts that this chapter 13 plan was not proposed in good faith because it is part of a fraudulent scheme to avoid payment of the debt debtor owes Columbia for breach of fiduciary duty.

A chapter 13 plan cannot be confirmed unless, among other things, it was proposed in good faith. § 1325(a)(3). The factors considered in determining good or bad faith for proposing a plan are the same as those applied to the determination of whether a debtor filed a chapter 13 petition in good faith. In re Eisen, 14 F.3d 469, 470 (9th Cir. 1994). The court must consider the totality of the circumstances, including the following factors:

> (1) whether the debtor misrepresented facts in his or her petition or plan, unfairly manipulated the Bankruptcy Code or otherwise filed the Chapter 13 petition or plan in an inequitable manner;
>
> (2) the debtor's history of filings and dismissals;
>
> (3) whether the debtor's only purpose in filing for chapter 13 protection is to defeat state court litigation; and
>
> (4) whether egregious behavior is present.

In re Ho, 274 B.R. 867, 876 (9th Cir. BAP 2002). Filing bankruptcy on the eve of or in the midst of a state court trial is not necessarily indicative of bad faith. In re Cox, 247 B.R. 556, 564 (Bankr. D. Mass. 2000). Nor is the fact that the debtor

---

[3] Although Columbia asks the court to deny confirmation and dismiss the case, it has not filed a motion to dismiss. Therefore, I will not consider whether the case should be dismissed.

is seeking to use chapter 13 to discharge a debt that would be nondischargeable in chapter 7, by itself, bad faith. See In re Selden, 121 B.R. 59 (D. Or. 1990); In re Street, 55 B.R. 763, 765 (9th Cir. BAP 1985).

The debtor has the burden to prove that all requirements for confirmation have been met, including the requirement of good faith. In re Padilla, 213 B.R. 349, 352 (9th Cir. BAP 1997); In re Heath, 182 B.R. 557, 560 (9th Cir. BAP 1995).

Debtor has established that he proposed his chapter 13 plan in good faith. There is no evidence that debtor misrepresented facts on his petition. The mere fact that debtor is seeking to use chapter 13 to discharge the otherwise nondischargeable debt to Columbia is not dispositive. See, e.g., Street, 55 B.R. at 765. Debtor has not previously filed bankruptcy. Although he filed his petition within weeks of entry of the state court judgment against him, he proposes to pay through the plan an amount no less than what Columbia would obtain in a chapter 7 liquidation, which in this case is not an insignificant sum. Thus, I find that he did not file his petition solely to defeat state court litigation. See Eisen, 14 F.3d at 470-71. Debtor's behavior has not been egregious.

I do not find that debtor has manipulated the Bankruptcy Code or otherwise proposed his chapter 13 plan in an inequitable manner. The testimony established that debtor and Ms. Gordon had discussed divorce off and on for years, and that both before and during the marriage they had discussed how property would be divided upon divorce. The stress of the litigation with Columbia was the final straw that caused Ms. Gordon to seek dissolution of the marriage. The divorce was not debtor's idea, and he did not want the marriage to end. The parties' purpose in obtaining the divorce quickly, waiving the waiting period, was not to get it completed before the Columbia trial, but instead was to complete the divorce while their daughter was on summer vacation in order to spare her the trauma of going through the dissolution process.

Debtor's original chapter 13 plan has been amended to remedy some of the problems of which Columbia complains.

Therefore, I conclude that debtor has established that he proposed his chapter 13 plan in good faith.

2. Disposable income

Columbia next argues that debtor's plan fails to provide for payment of all of his disposable income, as required by

§ 1325(b)(1)(B). It asserts that debtor's income has increased from $45,000 per year to $50,000 or $55,000, which should be reflected in the plan payments.

Section 1325(b)(1)(B) requires that a debtor make plan payments of all projected disposable income. Debtor's amended schedules, filed in November 2004, show monthly income of $4,583.00 ($54,996 annually), with take home pay of $3,374.00, and current monthly expenses of $2,946.00, leaving disposable income of $428.00. Debtor's Second Amended Plan, dated February 3, 2005, requires payments of $100 per month for 3 months and $428 per month thereafter. The Second Amended Plan provides for debtor's payment of all of his disposable income, as required by § 1325(b)(1)(B).

3. Best interests test

The court may not confirm a chapter 13 plan unless the plan proposes to pay to unsecured creditors at least as much as they would receive in a chapter 7 liquidation. § 1325(a)(4). Columbia argues that debtor's proposed plan fails to meet this test, as it does not provide for recovery of the property that was transferred to Ms. Gordon in the dissolution, which Columbia asserts was a fraudulent transfer.

The plan says that the best interests number is $8,934.25, plus the value of the alleged fraudulent conveyance claim against Ms. Gordon. In addition to monthly payments of $100 for three months and $428 thereafter, debtor proposes to pay an amount sufficient to pay the value of the fraudulent transfer claim, financed through a personal loan from his parents.

In calculating the best interests number, the court must determine the value of property that would have been liquidated in a chapter 7 case. "[T]he deemed chapter 7 liquidation which would have produced the cash payment is based upon the value of the nonexempt property in the estate on the date the petition was filed." 8 Lawrence P. King, Collier on Bankruptcy ¶ 1325.05[2][a] (15th ed. Rev. 2004)(footnotes omitted). This number includes "property that would be likely to [be] recovered by a chapter 7 trustee's use of the avoiding powers." Id. at ¶ 1325.05[2][d] (footnote omitted).

A. May debtor simply provide for payment of the value of the fraudulent conveyance claim rather than actually pursue the claim?

Columbia first argues that the plan must provide for affirmative recovery of the fraudulent transfer claim from Ms. Gordon, rather than allowing debtor to pay the value of that claim into the plan.

There is no requirement in the best interests test that the debtor pay through the plan the exact assets that would be used to pay creditors in a chapter 7 case. What is required is that creditors will receive through the plan the value that they would receive in a chapter 7. Therefore, debtor need not actually pursue the avoidance action; instead, he may simply include the value of the avoidance action in the best interests calculation. As Collier says:

> The language of the statute plainly means that the court is to ascribe a liquidation value to all nonexempt property of the estate, as that term is defined under section 541. In addition, the court must consider property that would be likely to [be] recovered by a chapter 7 trustee's use of the avoiding powers.

Collier on Bankruptcy at ¶ 1325.05[2][d] (footnotes omitted). Accord 2 Keith M. Lundin, Chapter 13 Bankruptcy § 160.1 at pp. 160-16, 160-17 (3d ed. 2004)(court must consider potential recovery of avoidance actions in calculating assets that would be available to creditors under chapter 7 liquidation for purposes of best interests test).

A number of cases have recognized that a debtor may pay the value of an avoidance action, without imposing any requirement that the action actually be pursued. For example, in In re Larson, 245 B.R. 609, 614 (Bankr. D. Minn. 2000), the court recognized that, in applying the best interests of creditors test for chapter 13 confirmation purposes, it needed to look "not only at the Debtor's assets as listed on his schedules, but . . . must also consider the recovery of assets by the trustee through fraudulent transfer and preference actions." The question was "whether a trustee could be reasonably expected to succeed in setting aside the transfers . . . ." Id. at 615 (applying state fraudulent transfer law to avoid transfer under § 544). The court concluded that, were a trustee to pursue avoidance of the debtor's transfer of real property, it was reasonably likely that the trustee would succeed. The court took into account the full value of the property that had been transferred in calculating the best interests amount. Id. at 616.

Similarly, in In re Sitarz, 150 B.R. 710, 720 (Bankr. D. Minn. 1993), the court recognized that fraudulent transfer claims were relevant to the best interests test, but concluded that, in that case, there was no likelihood of success on the merits or of collection, so no value was included in the best interests calculation for the alleged fraudulent transfer claim. Accord In re Lapin, 302 B.R. 184 (Bankr. S.D. Tex. 2003)(recognizing that avoidance actions could increase recovery for unsecured creditors and thus are relevant to best interests test); In re Cox, 247 B.R. 556, 565 n.13 (Bankr. D. Mass. 2000)("Under Chapter 7, a trustee in bankruptcy would have the power to avoid fraudulent and preferential transfers, thereby increasing the assets in the estate and the overall payout to creditors. Therefore, where such avoidance actions would be successful in Chapter 7, a Chapter 13 Debtor must propose a plan which would equal or exceed the payout to creditors under Chapter 7, taking into account the value of the avoidance actions."); In re Carter, 4 B.R. 692 (Bankr. D. Colo. 1980)(court denied confirmation of chapter 13 plan where court determined that creditors had established that there was a "legitimately justiciable issue" that likely would have been pursued by a liquidating trustee and that likely would have been successful, and the debtors failed to include the value of that claim in the plan). See also In re Affiliated Foods, Inc., 249 B.R. 770, 788 n.21 (Bankr. W.D. Mo. 2000)(in chapter 11 case, court noted that best interests test requires court to estimate the value of all estate assets, including potential avoidance actions).

Debtor may meet the best interests test by proposing a plan that would pay the value of what would be available to creditors in a hypothetical chapter 7 liquidation from pursuit of the fraudulent conveyance action, without requiring that the action actually be pursued against Ms. Gordon.

I reject Columbia's argument that there is no assurance that debtor can fund a plan that requires him to pay the value of the fraudulent conveyance action. I accept debtor's testimony that he will be able to obtain a loan from family members to pay the amount required under the best interests test.[4]

---

[4] Of course, because I conclude that the amount debtor must pay is more than his current proposal, he will need to demonstrate his ability to pay an increased amount, if he chooses
(continued...)

B. Must debtor pay only the settlement value of the fraudulent transfer claim?

Debtor argues that "[t]he court must value the alleged avoidance action for the purposes of the Best Interest Number at what the Court believes is the settlement value," citing In re Best Products Co., Inc., 168 B.R. 35, 71 (Bankr. S.D.N.Y. 1994). Debtor's Response Brief at 8.

I disagree that the case requires the court to value the fraudulent transfer claim at settlement value. In Best Products, the claim that was being valued for best interests purposes in a chapter 11 case was a claim that was actually being compromised. The court approved the compromise. The court's observation that the claim would be valued at its settlement value for purposes of the best interests test if it were not being compromised is dicta.

In this case, there is no proposed settlement for the court to consider. At the confirmation hearing, the chapter 13 trustee, who holds the power to settle the fraudulent transfer claim concurrently with debtor, see In re Cohen, 305 B.R. 886, 897 (9th Cir. BAP 2004)(chapter 13 debtor holds avoidance powers concurrently with trustee), indicated that he would not settle for the amount proposed by debtor.[5] Therefore, the value of the claim should be determined without regard for settlement value. This removes the court from the exercise of determining a settlement value in the first place, rather than approving a settlement if one is proposed by the parties. Nonetheless, the value of the fraudulent transfer claim must be determined with the probable outcome in mind.

C. Is it likely that the property division pursuant to the stipulated dissolution judgment was a fraudulent transfer?

Columbia argues that, under either § 548(a)(1)(A) or § 548(a)(1)(B), a chapter 7 trustee would have recovered for the estate property fraudulently transferred, based on the transfer of property to Ms. Gordon pursuant to the stipulated dissolution judgment. As relevant here, under § 548(a), a transfer can be

[4](...continued)
to propose a plan that offers to pay more.

[5] The trustee valued the fraudulent transfer claim for best interests purposes at $119,126.25.

avoided as fraudulent if it is either (1) made with the actual intent to hinder, delay or defraud creditors; or (2) made for less than reasonably equivalent value when the debtor was insolvent.

(a) Actual intent

Based on the testimony at the confirmation hearing, I conclude that the property division agreed to by the parties and incorporated in the stipulated dissolution judgment was not done with actual intent to hinder, delay, or defraud creditors.

The evidence established that, although debtor and Ms. Gordon finally decided to divorce shortly before the trial in the Columbia matter, they had discussed divorce and property distribution long before that time, including before and shortly after their marriage. They had discussed how property would be divided upon divorce, in large part because Ms. Gordon had been married before and brought certain assets into the marriage, including a house. The timing of the dissolution was driven by Ms. Gordon's final decision to pursue divorce, which appears to have been at least partly a result of the stress of dealing with the Columbia state court litigation. They decided to divide the property according to their earlier discussions, and to waive the statutory waiting period so the divorce could be completed while their daughter was away on summer vacation.

Further, at the time of the dissolution, both debtor and Ms. Gordon were defendants in the state court action, and Columbia was making at least some of the same claims against Ms. Gordon as it was making against debtor. Therefore, transferring assets from debtor to Ms. Gordon was not likely to have been intended to shield the assets from creditors.

I am convinced that this dissolution was a result of a breakdown of the marriage, and that the property division was a result of long-time expectations of the parties, not of an actual intent to defraud Columbia or any other creditors.

(b) Less than reasonably equivalent value

Absent an actual intent to defraud, a prepetition transfer of an interest in property from the debtor to another party may be a fraudulent transfer if the debtor received less than reasonably equivalent value for the exchange. § 548(a)(1)(B). It is on this claim that the parties primarily focused their energy, and which I conclude has merit.

In determining whether a property distribution in a marital settlement agreement was a fraudulent transfer, the court need only make a "'surface determination' . . . that the division of marital property between the divorcing parties was within the range of likely distribution that would be ordered by the state divorce court if the property division had actually been litigated in that state court." In re Sorlucco, 68 B.R. 748, 753 (Bankr. D.N.H. 1986).

> It must be shown that the property division was the result of arms-length bargaining in the light of the likely range of distribution that the divorce court might order if the matter went to a contested trial. Settlements reached in the shadow of an imminent bankruptcy filing would raise a clear factual question as to the bona fides of such bargaining.

Id. at 755. Accord In re Williams, 159 B.R. 648 (Bankr. D.R.I. 1993), remanded on other grounds, 190 B.R. 728 (D.R.I. 1996) (applying Sorlucco test); In re Hope, 231 B.R. 403 (Bankr. D.D.C. 1999)(same).

(i) Value of property distributed pursuant to stipulated dissolution judgment

In order to determine whether the property division was within the likely range of distribution in a contested dissolution trial, I must first determine the value of what the parties received under the stipulated dissolution judgment.

As relevant here, the stipulated dissolution judgment divided the marital property as follows:

Debtor:

1/2 the equity in the 133rd Ave. house
Debtor's IRA

Ms. Gordon:

1/2 the equity in the 133rd Ave. house
Judgment against debtor, secured by lien on 133rd Ave. house
Wintergreen house
Ms. Gordon's PERS account

In addition, debtor agreed to indemnify and hold Ms. Gordon harmless from obligations, including attorney fees, arising out of the Columbia litigation. After the dissolution, Columbia obtained a judgment against debtor for breach of fiduciary duty in the amount of $225,000, and against Ms. Gordon for unjust enrichment in the amount of $23,555, which Ms. Gordon paid and is now added to the $100,000 judgment against debtor and lien on the 133rd Ave. house, for a total lien in Ms. Gordon's favor of $123,555.

The parties stipulated that the 133rd Ave. house had a value of $425,000, subject to liens of $238,000, leaving equity of $187,000. The $238,000 lien includes $80,000 that the parties borrowed against the house to fund the attorney fees in the Columbia litigation. The stipulated dissolution judgment provided that the equity in the 133rd Ave. house would be split between the parties when the property was sold. Thus, each spouse received $93,500 from the 133rd Ave. property.

The Wintergreen house had a value of $210,000, and was free of liens. It was undisputed that any sale of the Wintergreen property would incur a tax liability of $45,000, because it had been a rental property. That leaves the value of the Wintergreen property that went to Ms. Gordon at $165,000.[6]

The primary disagreement relates to the value of Ms. Gordon's PERS account. In agreeing on the distribution of their marital property, the parties valued that account at $150,000, and valued debtor's IRA at $195,000. Exhibit B. They essentially treated the retirement accounts as a wash. In fact, the face value of the PERS account was $251,683, and debtor's IRA had a face value of $186,000.

Debtor argues that, because the PERS account is an exempt asset and therefore would not be of value to creditors, it should not be considered in the fraudulent transfer analysis. In his view, the court should disregard the PERS account in calculating the value of what debtor received and what he transferred. Debtor disregarded the PERS account when he calculated the value of the fraudulent transfer claim at $63,000.

I disagree. The Ninth Circuit BAP has concluded that, for purposes of determining whether a transfer was for reasonably equivalent value, the court should not "disregard the value of property transferred to a debtor because it may not be

---

[6] If the tax consequences of sale are not taken into account, the disparity in value between what Ms. Gordon received in the property distribution and what debtor received was even greater.

susceptible to direct attachment and execution." In re Roosevelt, 176 B.R. 200, 208 (9th Cir. BAP 1994). In that case, the chapter 7 trustee brought an action to avoid as fraudulent the transfer of property from the debtor to the debtor's former spouse pursuant to a marital settlement agreement. The debtor was left with property that was beyond the reach of creditors. The trustee argued that the court should value the property transferred to the debtor at zero in determining what debtor received in the transfer.

The panel recognized that, under Britt v. Damson, 334 F.2d 896 (9th Cir. 1964), a bankruptcy trustee may set aside a property division in a divorce decree "only to the extent that the spouse received more than the debtor." 176 B.R. at 206. It noted that, in looking at whether a debtor obtained reasonably equivalent value for such a transfer, the court must look at the transfer from the standpoint of creditors. Id. In analyzing a transfer between spouses pursuant to a divorce, "it is appropriate to perceive dissolving spouses as mutual creditor-debtors, because the law requires a fair and equitable settlement of their claims against the marital res and one another." Id. at 207. The panel concluded that, although a debtor may convert non-exempt property to exempt property on the eve of bankruptcy, the value of exempt property must be included in determining whether the value of the property transferred was equal to the value of what the debtor received through the marital settlement agreement. "There is no language in either the state statute or the Code to suggest that the court may disregard the value of property transferred to a debtor because it may not be susceptible to direct attachment and execution." Id. at 208.

The Sixth Circuit reached the same conclusion, holding that, where the debtor had an interest in exempt property at the time of divorce, and the property was transferred to the former spouse, "the fact that, [under state law, the property (lottery proceeds) was beyond the reach of creditors] is simply not legally relevant." In re Fordu, 201 F.3d 693, 701 (6th Cir. 1999). That was because the lottery proceeds were part of the marital estate, in which the debtor had an interest, and which he transferred away pursuant to the marital settlement agreement. Id. at 702.

This approach makes sense, especially in a marital property division situation. A marital property division takes into account all marital property, whether exempt or not. Under Oregon law, the property is to be divided between the divorcing spouses in a way that is just and proper under all the circumstances. ORS 107.105(1)(f). The fact that certain assets that are divided might be beyond the reach of creditors is irrelevant to the value attributed to those assets for purposes of property division. If the property division is unequal, and is outside the range of property division that a domestic relations court would have made in a contested dissolution proceeding, the transfer fits within the "less than reasonably equivalent value" standard of § 548 and should be avoided.

Having decided that the value of exempt property must be considered in determining whether there was a fraudulent transfer, I turn to a determination of the value of the PERS and IRA accounts that were distributed under the stipulated dissolution judgment.

Bradford Creveling testified as an expert on valuation of the PERS account. He calculated that the marital share of Ms. Gordon's account, which had a face value of $251,683, was $665,219 as of the date of dissolution. This takes into account that only that portion of the PERS account that is attributable to the marriage is considered a marital asset. See Richardson and Richardson, 307 Or. 370 (1989).

Creveling also testified that, at the time of the dissolution, litigation was pending regarding changes the legislature had made to PERS. If those changes, which were in effect at the time of the dissolution, had been upheld by the Supreme Court, the value of Ms. Gordon's PERS account would have been reduced by approximately 20 percent. Because the value of the transfer should be determined as of the date of the dissolution, Richardson, 307 Or. at 377, and at that time the statutory changes had not been invalidated, I conclude that the value of the marital portion of the PERS account at the date of dissolution was $532,175, which is $665,219 less 20 percent.

I also conclude that the value of both the PERS account and debtor's IRA must be reduced by the potential future tax liability. In Alexander and Alexander, 87 Or. App. 259 (1987), the court of appeals agreed that the trial court should have deducted potential tax liability in determining the value of the husband's retirement account.

Creveling testified that he would attribute a 30 percent tax rate to debtor's IRA account, and he used the same percentage in calculating the value of the PERS account, if there were to be a buy-out of the PERS. Thus, the IRA was worth $130,000 at the time of dissolution, and the marital portion of the PERS account was worth $372,522 ($532,175 less 30%).

Given those determinations of value, the parties' property division produced the following results:

	Wife	**Debtor-Husband**
Wintergreen Property (unencumbered)	$165,000	
133rd Ave. Property	$ 93,500	$ 93,500
Husband's IRA		$130,000 (face value $186,000)
Wife's PERS account	$372,522 (face value $251,683)	
Wife's judgment against husband	$123,555	
Total Assets	$754,577	$223,500
Less Liabilities		$308,555[7]
Net Award	$754,577	($85,055)

(ii) Probable marital property division under Oregon law

Oregon law provides for the division of property upon dissolution of marriage "of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances." ORS 107.105(1)(f). Under the statute, all personal or real property held by the parties at the time of dissolution, termed "marital property," is subject to distribution, whether that property was brought into the marriage by one of the parties or was acquired during the marriage. Kunze and Kunze, 337 Or. 122, 133 (2004). A subset of marital property is the marital asset, which is any property acquired by either party during the marriage. Id. There is a statutory rebuttable presumption of equal contribution with regard to marital assets. Id.

In deciding how to distribute property in a dissolution, the court first looks at property brought into the marriage by the parties. The court then considers what distribution of that

[7] This includes the $123,555 judgment awarded to wife, secured by debtor's interest in the 133rd Ave. property, and the $185,000 obligation to Columbia.

property is "just and proper in all the circumstances." Id. at 134 (quoting ORS 107.105(1)(f)). If property is a marital asset (i.e. acquired during the marriage), then the court applies the rebuttable presumption of equal contribution, regardless of how the property is held. If a spouse has commingled separate property with joint assets, it may be difficult for the spouse to rebut the presumption, either because the spouse cannot adequately identify the property separately contributed, or because the commingling shows an intent that the property become joint property of the marital estate. Id. at 138, 142. If the presumption is not overcome, a "just and proper" distribution of the asset is an equal division. Id. at 134. If the presumption is rebutted, the court decides what division is just and proper, without regard to the presumption. Id. at 135. This can include considering the contributions of each spouse to the acquisition of the property. Id. "[A]bsent other considerations, it is 'just and proper' to award that marital asset separately to the party who has overcome the statutory presumption." Id.

After the court makes these preliminary determinations, it must consider what division of all the marital property is just and proper in all the circumstances, considering the equities of the division. Id. This includes consideration of "the social and financial objectives of the dissolution, as well as any other considerations that bear upon the question of what division of the marital property is equitable." Id.

Under Oregon law, when one of the divorcing spouses has a PERS account, there are two options: either the spouse who has the PERS account keeps the account and the other spouse gets an equalizing judgment, or the account is divided between the spouses at the time of retirement through the use of a qualified domestic relations order (QDRO). Kelley v. Owens, 175 Or. App. 103 (2001).

Beth Mason, an expert in domestic relations law, testified that, in a contested dissolution, if Ms. Gordon had insisted on keeping her entire PERS account, debtor would have been awarded all of the real estate and anything else of value, to offset the value of the PERS account.

Eric Larson, who is also an expert in domestic relations law, testified that, in his opinion, under the circumstances existing in this case, a buy-out of the PERS account would not have worked, and a domestic relations court would have split the real property between the parties and awarded a QDRO to split the PERS account at retirement. In his view, debtor's failure to insist on receiving a portion of the PERS account resulted only in his loss of between $1,500 and $1,600 per month when Ms. Gordon retires.

What the testimony establishes is that a dissolution court would have either awarded Ms. Gordon the PERS account and given debtor property to equalize the distribution, or would have divided the property other than the PERS account and awarded debtor a QDRO so he could share in the proceeds of the PERS account upon Ms. Gordon's retirement. Under neither scenario would the court have ignored the PERS account.

After considering the expert testimony, Oregon law, and the facts, I conclude that, if a domestic relations court were to try this as a contested dissolution, the court would award each party one of the residences, so that they would each have a place to live. I also find that a dissolution court would take into consideration the fact that Ms. Gordon brought $20,000 and a house into the marriage, and give her the long half of the property in recognition of that contribution.[8] I further find that a court would attribute to debtor most, if not all, of the liability on the Columbia judgment. I do not think that the court would require debtor to repay to Ms. Gordon the entire $80,000 for attorney fees or the amount Ms. Gordon paid on the judgment, as she was a defendant in the action along with debtor, and the judgment against her was a result of unjust enrichment she enjoyed because of debtor's conduct. Thus, although other distributions are possible, a likely distribution would be:

Debtor

133rd Ave. property	$187,000
IRA	$130,000
Columbia debt	($185,000)
Total:	$132,000

[8] Even if the court did not give Ms. Gordon the long half of the property, I find persuasive Larson's testimony that the court would award debtor an interest in Ms. Gordon's PERS account through a QDRO, giving him a stream of payments over a period of years once the pension became payable, because that approach is equitable and leaves both parties with a residence and meaningful retirement assets. This is consistent with the social and financial objective of providing housing and retirement income.

Ms. Gordon

Wintergreen property	$165,000
PERS account	$372,522
Total:	$537,522

Although this would result in Ms. Gordon receiving the bulk of the assets, such a distribution would be just and equitable because Ms. Gordon was not a party to the wrongdoing that gave rise to the Columbia judgment, she brought significant assets into the marriage, and she is older than debtor and has less time to save for retirement.

(iii) Comparison of what debtor received and what debtor would likely have received in a contested dissolution proceeding

Based on the above discussion, the property division resulting from the stipulated dissolution judgment gave Ms. Gordon $754,577, while debtor assumed so much debt that it totally offset the assets awarded to him and left him with $85,055 in liabilities. In a contested dissolution, I conclude that debtor would receive assets with a net worth of $132,000. The property division resulting from the stipulated dissolution judgment is outside the range of property division that a dissolution court would have made in a contested dissolution proceeding, and thus gave debtor “less than reasonably equivalent value” within the meaning of § 548. There is no dispute that the division left debtor insolvent. That distribution would likely be found to be a fraudulent transfer.

D. Does debtor's proposal to pay $63,000 in lieu of pursuit of the § 548 claim meet the best interests test?

Having determined that the transfer of property effected pursuant to the stipulated dissolution judgment resulted in debtor receiving less than reasonably equivalent value in the transfer, I conclude that the transfer likely could be avoided as a fraudulent transfer under § 548. Avoidance of the transfer would result in the marital property division being set aside, and the parties returning to the state court for redistribution of the property. With that redistribution, debtor would have assets that a hypothetical chapter 7 trustee would liquidate in order to pay creditors.

"For purposes of the hypothetical liquidation in § 1325(a)(4), after valuing all assets that would be available in a Chapter 7 case, it is appropriate to deduct the costs of liquidation, including trustee's fees and other administrative expenses." Lundin, Chapter 13 Bankruptcy at § 160.1, p. 160-18. Only non-exempt assets would be available to a chapter 7 trustee.

Assuming that the stipulated dissolution judgment was avoided and the property was redistributed as set forth above, debtor would have $187,000 in equity in his residence. For purposes of the best interests test, that amount would have to be reduced by debtor’s $25,000 homestead exemption, costs of litigating the fraudulent transfer claim, costs of sale (including realtor’s and closing costs, which I estimate for purposes of this discussion to be 6% of the sale price, or $25,500), and the trustee’s commission on sale of the $425,000 133rd Ave. property, which under § 326(a) would be $24,500. The trustee estimated litigation costs of $12,000.[9] That would leave $100,000 of the $187,000 equity to be distributed in a liquidation.

Debtor proposes to pay $63,000 to compensate for the liquidation value of the fraudulent transfer claim. That amount would not result in creditors receiving as much in this chapter 13 case as they would in a chapter 7 liquidation. Therefore, I will deny confirmation of this plan. If debtor files an amended plan, he must propose to pay an amount sufficient to pay creditors the liquidation value of his estate.

[9] This amount seems quite low for the cost of litigating the fraudulent transfer claim and then the dissolution property division. A higher number might be more realistic. Nonetheless, even if the costs of litigation were estimated as high as $25,000 or $30,000, the amount debtor proposes to pay is not sufficient to meet the best interests test.

CONCLUSION

I will deny Columbia's request for assignment of the avoidance claim. Mr. Vanden Bos should submit an order denying Columbia's motion for assignment of the avoidance claim.

For the reasons outlined above, I will deny confirmation of debtor's chapter 13 plan, because it does not meet the best interests test. If debtor files an amended plan, he must propose to pay the liquidation value of his assets, assuming the fraudulent transfer were set aside. The court will enter an order denying confirmation and giving debtor 28 days to file a modified plan.

Very truly yours,

/s/ Elizabeth L. Perris

ELIZABETH L. PERRIS
Bankruptcy Judge